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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Enforcement Issues at Concentrated Animal Feeding Operations

FROM: Eric V. Schaeffer, Director
Eric Schaeffer
Office of Regulatory Enforcement

TO: Regional Counsels, Region I-X
Water Division Directors, Regions I-X
Enforcement Division Directors, Regions I, II, VI, & VIII

This memorandum responds to several questions we have received from the Regions about the enforceability of certain Clean Water Act regulations that currently apply to concentrated animal feeding operations (CAFOs). Enforcement actions should, of course, take place in the context of a larger strategy that includes partnership with the Department of Agriculture and States, voluntary programs, and compliance assistance. The Office of Compliance (OECA) is already contributing to these efforts through the National Agriculture Compliance Assistance Center (Ag Center), which provides information on regulatory requirements and voluntary pollution prevention opportunities that affect AFOs. The Farm*A*Syst program, available on EPA's Website, also advises farmers of Clean Water Act requirements and offers practical cost-effective advice regarding how to comply. Specific enforcement priorities are identified in the CAFO Compliance Assurance Implementation Plan developed in consultation with the Office of Water, which may be further refined in the joint EPA/USDA strategy for animal feeding operations currently under development.

This memorandum is intended to assure that any enforcement actions undertaken pursuant to the Agency's strategy are consistent in applying existing regulations governing CAFO's, which have been in effect for over 20 years, and which generally cover the largest animal feeding operations. Enforcement actions may be brought for noncompliance with existing CAFO permits, or for discharging without a permit that is required under existing

regulations. The discussion below also addresses several frequently asked questions about the applicability of stormwater regulations in this context. The Office of Enforcement and Compliance Assurance, the Office of Water, and the Office of General Counsel are working together to clarify several additional interpretive issues that are beyond the scope of this memorandum.

First, under Section 502(14) of the Clean Water Act, CAFOs are point sources by definition. See 33 U.S.C. 1362 (14). The Agency's regulations at 40 CFR 122.23 and Part 122, Appendix B, define which facilities are CAFOs. These regulations provide, in part, that any AFO with over 1000 animal units is a CAFO, and thus is regulated by the NPDES program, regardless of the method of discharge (i.e. there does not need to be a discrete conveyance).

Second, EPA and authorized States may initiate enforcement actions against CAFOs for discharge without a permit, or for violation of an existing permit, even if the Agency or State does not observe an actual discharge while on the site, as long as there is evidence of such a discharge. The evidence needed to bring this type of action will be circumstantial in nature, and may include, among other things, size and condition of any containment facilities, any visual evidence of a breach or overload of these facilities, slope of land (and other topographical data), amount of rainfall, distance to waters of the U.S., evidence of manure residue leading to waters of the U.S., and instream monitoring data etc. As stated in the Southview Farms opinion, citing to *O'Brien v. National Gypsum Co.*, 944 F. 2d 69,72, "It is beyond any doubt that circumstantial evidence alone may suffice to prove adjudicative facts." Because these discharges are NPDES violations, the same standard of proof necessary to prove any other type of NPDES discharge applies here. That is, we must show, by a preponderance of the evidence, that a violation occurred. Each case should be assessed individually to determine whether we have evidence to support an enforcement action.

Third, when evaluating any potential causes of action against a facility, please keep in mind that the effluent guideline at 40 CFR Part 412, upon which permits for certain feedlots are based, apply not only to waste water from animal production activities but also to any precipitation that comes into contact with manure or other materials at feedlots. Thus, the "no discharge" requirement in a permit written to follow these effluent guidelines would apply to both components of waste waters. See 40 CFR § 412.13 (stating that the Best Available

Technology no discharge requirement applies to "process waste water pollutants") and § 412.11(c) ("process waste waters" includes a precipitation component, namely, "any precipitation (rain or snow) which comes into contact with any manure, litter or bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk, eggs)").

In cases where we have evidence that a facility has discharged without a permit, it is also important to review the facts to see whether violations of stormwater requirements are present. A point source that is subject to stormwater requirements under CWA § 402(p) (such as those CAFOs where the Feedlot effluent guideline at 40 CFR 412 would apply) and that has discharged contaminated stormwater without a permit is subject to enforcement for violations of CWA section 301(a). See 40 CFR § 122.26 (indicating which facilities are subject to stormwater requirements). These regulations say that if a facility is covered by an effluent guideline then it is also covered by the stormwater requirements.

You may also come across facilities that include both a CAFO and other operations that are subject to the stormwater regulations independent of the CAFO, such as commercial farm equipment sales and repair operations. In these situations, enforcement authorities should address both CAFO requirements and the other independent stormwater requirements as appropriate. Additional guidance can be sought from Regional and Headquarter stormwater contacts as to which operations would be subject to stormwater requirements apart from the CAFO.

Finally, I want to remind everyone that we have the authority to initiate emergency actions under several statutes. These "imminent and substantial endangerment" provisions are available against all sources, including AFOs. Section 504 of the CWA provides for injunctive relief to prevent or stop a pollution source or combination of sources which presents an imminent and substantial endangerment to the health of persons welfare of persons. Section 1431 of the Safe Drinking Water Act allows such relief from any contaminant that is present in or likely to enter a public water supply or underground source of drinking water that may present an imminent and substantial endangerment to the health of persons. The Agency has not used these authorities often in the past, but they are strong authorities and we should use them where appropriate.

While this memorandum clarifies key enforcement issues, I know that you will exercise good judgment when selecting appropriate cases for enforcement. Enforcement actions should focus on the greatest risks, reflect the priorities outlined in the Clean Water Action Plan and the CAFO Compliance Assurance Implementation Plan, and should be part of a broader program that includes outreach and compliance assistance to the agricultural community. Technical and legal assistance may be available through Headquarters and assistance on farm level comprehensive management plans which may form some portion of appropriate relief can be sought through a variety of private and public sources, including USDA. The EPA/USDA AFO joint strategy now under development will address some of these topics in greater detail.

If you have questions about whether or how to proceed in a particular case, please do not hesitate to contact Brian Maas, Director of the Water Enforcement Division (202) 564-2240, or have your staff call Nadine Steinberg at (202) 564-8186. We will assure any necessary coordination with the Office of Water and the Office of General Counsel.

cc: Regional NPDES Branch Chiefs
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